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No. 74-635

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

ROSE WONG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provision and statute involved	2
Statement	3
Summary of argument	9
Argument	11
A "putative defendant" called as a grand jury witness is not entitled to have her grand jury testimony suppressed in a perjury prosecution on the ground that she did not understand the government's warning concerning her "right to remain silent"	11
A. The privilege against compulsory self-incrimination does not require suppression of allegedly perjured grand jury testimony	12
B. Prosecution for perjury under the circumstances of this case does not violate the Due Process Clause	15
Conclusion	23

CITATIONS

Cases:

Beckwith v. *United States*, No. 74-1243, decided April 21, 1976	21
Brown v. *United States*, 245 F. 2d 549	20
Bryson v. *United States*, 396 U.S. 64	10, 13, 15, 18

Cases—Continued

	Page
Davis v. *North Carolina*, 384 U.S. 737	21
Garner v. *United States*, No. 74-100, decided March 23, 1976	13
Glickstein v. *United States*, 222 U.S. 139	14, 15, 18
Hampton v. *United States*, No. 74-5822, decided April 27, 1976	22
Haynes v. *Washington*, 373 U.S. 503	21
La Rocca v. *United States*, 337 F. 2d 39	20
Lefkowitz v. *Turley*, 414 U.S. 70	13
Masinia v. *United States*, 296 F. 2d 871	20
Miranda v. *Arizona*, 384 U.S. 436	21, 22
Schneckloth v. *Bustamonte*, 412 U.S. 218	21
Sherman v. *United States*, 356 U.S. 369	22
Sorrells v. *United States*, 287 U.S. 435	22
Turner v. *Pennsylvania*, 338 U.S. 62	21
United States v. *Cross*, 170 F. Supp. 303	20
United States v. *Del Toro*, 513 F. 2d 656, certiorari denied, 423 U.S. 826	18
United States v. *Dowdy*, 479 F. 2d 213, certiorari denied, 414 U.S. 866	22
United States v. *Icardi*, 140 F. Supp. 383	20
United States v. *Irali*, 503 F. 2d 1295	20
United States v. *Knox*, 396 U.S. 77	10, 14, 15, 18
United States v. *Lazaros*, 480 F. 2d 174	20, 22
United States v. *Mandujano*, 496 F. 2d 1050, reversed and remanded, No. 74-754, May 19, 1976	*passim*
United States v. *Orta*, 253 F. 2d 312	16
United States v. *Rangel*, 496 F. 2d 1059	8
United States v. *Russell*, 411 U.S. 423	22
United States v. *Watson*, 423 U.S. 411	21

Cases—Continued

	Page
United States v. *Winter*, 348 F. 2d 204, certiorari denied, 382 U.S. 955	17-18

Constitution and statutes:

United States Constitution, Fifth Amendment:	7, 14
Due Process Clause	2, 8, 10, 11, 15-16, 17, 22
Self-Incrimination Clause	2, 10, 13, 14, 15, 16, 17, 22
18 U.S.C. 1511	3
18 U.S.C. 1623	2, 6
18 U.S.C. 1955	3

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not yet reported. The order of the district court (App. 15) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on September 23, 1974. On October 23, 1974, Mr. Justice Douglas extended the time

within which to file a petition for a writ of certiorari to and including November 22, 1974. The petition was filed on November 22, 1974, and was granted on June 1, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a "putative defendant" called as a grand jury witness is entitled to have her perjurious statements suppressed on the ground that she did not understand the government's warning concerning her "right to remain silent."

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

18 U.S.C. 1623 provides in pertinent part:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On September 7, 1973, respondent Rose Wong testified before a grand jury in the Northern District of California. Her testimony was elicited in connection with a general investigation to discover violations of 18 U.S.C. 1955 (illegal gambling businesses) and 18 U.S.C. 1511 (obstruction of state and local enforcement). At the time of respondent's appearance before the grand jury, the government had evidence that she had paid bribes to certain local police officers, who had turned the money over to the Federal Bureau of Investigation. The government prosecutor sought her testimony in order to learn the names of other officers who might be receiving bribes, but who had not cooperated with the government (Tr. 96-97).[1]

Prior to testifying and after the grand jury foreman had administered the oath (App. 2), respondent was informed of the nature and purpose of the proceedings and was warned of her rights by the prosecutor (App. 2-4):

> Q. Mrs. Wong, my name is Robert B. Ward and this is Mr. Hinckeley. Both of us are attorneys for the Justice Department.
>
> This Grand Jury is investigating certain alleged violations of Federal Law, including the gambling laws, within the Chinatown area.
>
> You have been subpoenaed to testify here because the Grand Jury feels that you have infor-

[1] "Tr." refers to the transcript of the hearing in the district court on respondent's motion to dismiss the indictment.

mation which may be helpful in their investigation.

Prior to my asking certain questions, let me advise you of certain rights [to] which you are entitled as a witness here.

You, of course, need not answer any question which you feel may tend to incriminate you.

A. Uh huh.

Q. The Fifth Amendment of the United States Constitution gives you the right to refuse to answer any question which you feel might incriminate you.

Do you understand that, mam [*sic*]?

A. Yes.

Q. Further, if you do give an answer, that answer may be used against you in a subsequent criminal prosecution, if in fact the Government should decide to prosecute you for any crime. Any statements you make here may be used against you.

Do you understand that?

A. Yes.

Q. You also have the right to consult with an attorney prior to answering any question here today. Do you understand that?

A. Yes.

Q. Have you consulted with an attorney?

A. No.

Q. Please be advised that should the occasion arise in which you do not want to proceed without talking to an attorney, that you have the right to notify us, and we will stop the proceeding and you may consult with an attorney prior to continuing with the questioning.

Do you understand that, mam [*sic*]?

A. Yes.

Q. Further, if you cannot afford an attorney, that we would see that an attorney is afforded to represent you.

Do you understand that?

A. Yes.

In addition, the prosecutor carefully explained to respondent the meaning of perjury and the penalties to which she might be subjected if she perjured herself (App. 4):

> Q. Having sworn to tell the truth, Mrs. Wong, it is incumbent upon you to tell the truth, if you do answer any questions and should you knowingly give any false testimony, or false answers to any questions, you would be subject to prosecution for the crime of perjury under the Federal Laws.
>
> Do you understand that?
>
> A. Yes.
>
> Q. Do you know what perjury is?
>
> A. Not very well.
>
> Q. Well, in essence perjury means telling a lie under oath.
>
> Do you understand what that is?
>
> A. Yes.
>
> Q. Do you know the difference between lieing [*sic*] and telling the truth?
>
> A. Yes.
>
> Q. Under oath?
>
> A. Uh huh.
>
> THE FOREMAN: Mr. Ward, you might advise Mrs. Wong that the stenographer needs her answers.

MR. WARD: Q. Mrs. Wong, the Foreman points out that you must answer each question. You can't nod your head or mumble. She has to take down an answer.

Do you understand that?

A. Oh, I see that.

Q. She is writing down all the questions and answers.

A. I see.

Q. With respect to perjury, as we have discussed it, let me advise you that the Federal crime of perjury, before a Grand Jury, carries a penalty of five years imprisonment. That is a maximum penalty and/or $10,000 fine.

Following these warnings, the prosecutor questioned respondent regarding her knowledge of gambling activities at specific locations in Chinatown and of the identities of local police officers who frequented those locations (R. 49-69).[2] During the course of the examination, respondent was asked if she had given money or gifts to any police officers and if she had ever met with any police officers to discuss gambling activities. She denied that she had engaged in any such activities (App. 4-5).

On November 29, 1973, respondent was indicted in the United States District Court for the Northern District of California for perjury, in violation of 18 U.S.C. 1623, on the basis of those denials before the grand jury (App. 5-6). On January 22, 1974, respondent filed a motion to dismiss the indictment on

[2] "R." refers to the record on appeal in the Ninth Circuit.

the ground, *inter alia*, that the testimony on which the indictment was based had been obtained without effective prior warnings of her Fifth Amendment rights (App. 7-8). At an evidentiary hearing on the motion to dismiss, held on January 29, 1974, and February 8, 1974, respondent sought to show that she was only minimally competent in the use of the English language and that she had not understood the warnings administered by the prosecutor in the grand jury room (Tr. 73-87; R. 29-32). In response, the government offered affidavits from the grand jury foreman and from the stenographer who had recorded respondent's grand jury testimony, both of which stated that "[respondent] had no difficulty whatsoever in understanding the questions asked of her" (R. 71) and that "[s]he answered the questions clearly and without undue hesitation, speaking in the English language" (R. 72). In addition, the government attorney who had managed the grand jury investigation stated in his own affidavit that with other witnesses called to testify during the investigation he had used an interpreter and that he would similarly have used an interpreter with respondent "had [there] been even the slightest indication of a language problem" (R. 73).

At the conclusion of the hearing the district court orally ruled that respondent's grand jury testimony should be suppressed.[3] The court found that although

[3] Although respondent's motion initially was for dismissal of the indictment, it was subsequently treated by the court, at respondent's request, as a motion to suppress her grand jury testimony (App. 11).

respondent had been given "a full, complete and adequate warning" of her privilege against self-incrimination prior to testifying, her lack of proficiency in the English language prevented her from understanding the warning (App. 14). Although the district court issued no written findings of fact, it stated during the course of the hearing that respondent had fully comprehended both the prosecutor's explanation of the concept of perjury and her obligation to testify truthfully (App. 13, 14-15). The court said respondent also had understood the substantive questions asked of her and "[had given] the answers she wanted to give" (App. 12). In addition, the court noted that the prosecutor had done "just about everything * * * [he] could reasonably be expected to do" to inform respondent of her rights before the grand jury (App. 10; see also App. 14).

On the government's appeal, the court of appeals affirmed. Relying in large part upon the opinions of the Court of Appeals for the Fifth Circuit in *United States* v. *Mandujano*, 496 F. 2d 1050, reversed and remanded, No. 74-754, May 19, 1976, and *United States* v. *Rangel*, 496 F. 2d 1059, which it termed "the only precedents directly in point" (Pet. App. 4a, n. 3), the court of appeals reasoned that "[t]he perjurious answers were induced by an unfair procedure violative of the [Due Process Clause of the Fifth Amendment]" (Pet. App. 2a). The procedure the court found unfair was the practice of issuing grand jury subpoenas to individuals known by the government to be involved in the matter under investigation

and questioning those individuals concerning that involvement. The unfairness stemmed, according to the court "from the threat * * * pose[d] [by this practice] to the values protected by the privilege [against self-incrimination]" (Pet. App. 2a). To remedy the perceived unfairness, the court held that questioning of grand jury witnesses known by the government "to be virtually in the position of a defendant" must be "accompanied by warnings which in fact apprise the witness of the right to remain silent * * *" (Pet. App. 3a).

The court acknowledged that respondent in this case had received all the warnings to which she was entitled under the court's holding and stressed that it found no "bad faith" on the part of the government (Pet. App. 5a, n. 4). Indeed, the court found that "the government's attorney carefully informed appellee of her rights and believed she understood them" (*ibid.*). The court nevertheless held that the "unfairness" had not been remedied by the prosecutor's efforts, since respondent in fact had not understood the explanation of her rights (Pet. App. 5a).

SUMMARY OF ARGUMENT

1. All three opinions in *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976, concur unreservedly in the proposition that, whether or not the prosecutor is obliged by the privilege against compelled self-incrimination to give some form of warnings to grand jury witnesses who are "putative" or "potential" defendants, such a witness may not com-

mit perjury and thereafter claim that the Constitution affords protection from prosecution for that crime. That conclusion was the outgrowth of a consistent line of decisions of this Court stretching back over 50 years.

There is no basis for reaching a different result in this case. The only arguable distinction in the facts of the two cases arises from the finding in this case that the respondent did not understand the advice of rights that she received prior to testifying before the grand jury. At most, however, that places her in the position of one who has received no warnings at all. But even if, *arguendo*, such a witness might be said to have been "compelled" to give testimony, the absence of warnings in no way compels the witness to answer falsely. Cases such as *Bryson* v. *United States*, 396 U.S. 64, and *United States* v. *Knox*, 396 U.S. 77, in which the defendants' false statements were the product of much more direct and palpable coercion, dispose of any argument that the Self-Incrimination Clause supports a different result in this case from that reached in *Mandujano*.

2. Nor is the result different when the case is analyzed in terms of the Due Process Clause. The practice of calling "potential defendants" before the grand jury ordinarily implicates only those interests with which the Self-Incrimination Clause is concerned; absent some extraordinary circumstance not here present, the Due Process Clause brings no significant additional constitutional policies to bear upon the question whether a "potential defendant" may

testify falsely without fear of subsequent prosecution. Thus, if the testimonial privilege is not violated by what happened in this case, talismanic invocation of the Due Process Clause does not justify affording a defendant relief. Indeed, all opinions in *Mandujano* were in agreement that the facts of that case presented no due process problem; the facts of the instant case are identical in all material respects. As indicated, the only difference in the two cases concerns the defendants' subjective understanding of the advice of rights given prior to questioning; whatever arguable relevance such a distinction may have to the self-incrimination analysis, it is wholly unrelated to the fairness of the governmental conduct involved, which is the touchstone of due process analysis.

ARGUMENT

A "Putative Defendant" Called As A Grand Jury Witness Is Not Entitled To Have Her Grand Jury Testimony Suppressed In A Perjury Prosecution On The Ground That She Did Not Understand The Government's Warning Concerning Her "Right To Remain Silent"

In our brief in *United States* v. *Mandujano*, No. 74-754, October Term, 1974, decided May 19, 1976, and in our brief this Term in *United States* v. *Washington*, No. 74-1106, we have discussed at some length the propriety of calling "potential defendants" before grand juries and the nature of the obligation, if any, to provide warnings to such individuals prior to questioning them before the grand jury.[4] These issues have been examined in light of

[4] Copies of the government's briefs in *Mandujano* and *Washington* are being furnished to respondent's counsel.

both the privilege against compelled self-incrimination and the government's obligation to afford due process of law, and we have argued on the basis of that examination that there is no valid constitutional objection to calling "potential defendants" before the grand jury and no constitutional duty on the prosecutor to warn such witnesses of their rights. Because *Mandujano* produced no opinion for a majority of the Court, those questions remain unsettled in non-perjury cases; it may be anticipated that they will, to some extent at least, be resolved in *Washington*.

We do not here reiterate our general arguments. To the extent the Court may find it necessary to consider these issues, we rely on the arguments being made contemporaneously in *Washington*. In our view, the broad issues of governmental responsibilities toward grand jury witnesses need not be reached in the instant case, because this case turns, as did *Mandujano*, on the fact that this is a perjury prosecution. Accordingly, we address here the question whether there is any reason, in light of either self-incrimination or due process considerations, why this Court should depart in this case from its unanimous holding in *Mandujano*.

A. *The privilege against compulsory self-incrimination does not require suppression of allegedly perjured grand jury testimony.*

While no opinion in *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976, commanded a majority of this Court, all three opinions agreed that "[t]he Fifth Amendment privilege against compulsory self-incrimination provides no protection for the

commission of perjury" (Stewart, J., concurring; see plurality op. 11-13; Brennan, J., concurring op. 1). The Court recognized that "[p]erjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings," which "simply has no place whatever" "[i]n th[e] constitutional process of securing a witness' testimony * * *" (plurality op. 11). Effective restraints against the commission of perjury were seen as particularly necessary in the context of the grand jury, whose historic office has included the conduct of thoroughgoing investigations to ascertain whether crime has been committed (and by whom) and the provision of "a shield against arbitrary or oppressive action" by government prosecutors (plurality op. 6; see also *id.* at 6-13).

Mandujano is dispositive of any claim by respondent that her indictment for perjury is barred by the Fifth Amendment privilege against compulsory self-incrimination. The privilege entitles a witness to resist efforts to compel potentially incriminatory statements, and, if the witness's resistance is overcome, the compelled self-incriminating statements will be excluded from future substantive use by the prosecution. See *Garner* v. *United States*, No. 74-100, decided March 23, 1976, slip op. 5-6; *Lefkowitz* v. *Turley*, 414 U.S. 70, 78. But the witness may not avoid compulsion by committing perjury. See *Bryson* v. *United States*, 396 U.S. 64, 72. Indeed, in making the statements that are the subject of the indictment in this case, respondent has not been compelled to incriminate herself regarding a past crime; she has,

instead, committed a new crime for which the Fifth Amendment privilege affords no protection. See *United States* v. *Knox*, 396 U.S. 77, 82. "[T]he immunity afforded by the constitutional guarantee [against compulsory self-incrimination] relates to the past and does not endow the person who testifies with a license to commit perjury." *Glickstein* v. *United States*, 222 U.S. 139, 142.

This much is common ground for all the Justices who participated in *Mandujano*, and, we submit, it applies four-square to the facts of this case, which are virtually identical in all material respects. The only arguable distinction between the cases is that in *Mandujano* there was no finding that the defendant had not understood the advice of rights that he received. Here, respondent received the same advice of rights (indeed, a slightly broader one, since she was explicitly offered appointed counsel), but the court found that she had not understood it. This is a distinction without a difference for purposes of the self-incrimination analysis. At most, the district court's finding here would justify treating respondent's case as one in which no warnings at all had been administered, in contrast to Mandujano's case in which the court of appeals found that the warnings given had been insufficient. But it is plain, under the Self-Incrimination Clause, that a failure to warn would no more excuse perjury than administration of an insufficient warning.

Accepting for purposes of this analysis the view expressed in Mr. Justice Brennan's concurring opinion

in *Mandujano* that questioning of a "putative" defendant may be considered coercive in the absence of a knowing and intelligent waiver of the testimonial privilege, and that such a waiver depends upon an effective advice of rights, that view simply puts respondent in the position of one who has (in this somewhat special sense) been "forced" to testify. But respondent was not in any meaningful sense forced to testify falsely. In *Bryson*, the defendant was obligated to file a "non-Communist" affidavit with the National Labor Relations Board if he wished to retain his union office (see 396 U.S. at 67), and in *Knox*, the defendant faced criminal penalties unless he filed the wagering tax return in which he allegedly made false statements (*id.* at 81). The defendants in both cases surely were confronted with greater coercion than was respondent in the instant case, yet both were held accountable for the falsity of their statements. As Mr. Justice Harlan stated in *Knox* (396 U.S. at 82): "[W]hen Knox responded to the pressure under which he found himself by communicating false information, this was simply not testimonial compulsion."

B. *Prosecution for perjury under the circumstances of this case does not violate the Due Process Clause.*

Recognizing that, under the *Knox-Bryson-Glickstein* line of authority, suppression of false testimony cannot be justified by reference to the self-incrimination provision of the Fifth Amendment (Pet. App. 2a-3a), the court of appeals here, like the court of appeals in *Mandujano*, explicitly rested its holding on the Due

Process Clause (*id.* at 2a). And in *Mandujano*, Mr. Justice Brennan suggested that the only relevant inquiry in considering whether a "putative defendant" who commits perjury before a grand jury may be prosecuted is whether the "false answers were * * * induced by governmental tactics or procedures so inherently unfair under all the circumstances as to constitute * * * a violation of the Due Process Clause of the Fifth Amendment" (concurring op. 1; see also plurality op. 5 (quoting from *United States* v. *Orta*, 253 F. 2d 312, 314 (C.A. 5)); Stewart, J., concurring).

Barring the presence of truly extraordinary facts, however, we have difficulty understanding how the due process inquiry can aid the analysis. The interests implicated by grand jury questioning of potential defendants, to the extent they reflect any constitutional values, appear to us to involve almost exclusively the policies of the Fifth Amendment's protection against compelled self-incrimination. When those policies are not offended, as they plainly are not here (see pp. 12-15, *supra*), there can ordinarily be no basis for relief on due process grounds.[5] Surely

[5] The court of appeals justified its reliance on the Due Process Clause in part as a means of further insulating the values protected by the privilege against self-incrimination (Pet. App. 2a, 3a-4a). But as we have explained (pp. 12-15, *supra*), and as this Court held in *Mandujano*, the testimonial privilege is not implicated when a witness is prosecuted for perjury. Indeed, the court of appeals in this case acknowledged that this was the case (Pet. App. 3a). The court of appeals' due process rationale thus must rest on some other constitutional value.

the vague and seemingly talismanic invocation of due process by the court of appeals here does not suffice to explain how the Due Process Clause could justify the result reached by the court when the Self-Incrimination Clause concededly does not. In any event, whatever the general validity of an independent due process analysis in cases such as this, what transpired here involved no improper government conduct, and certainly no misconduct so fundamentally unfair that respondent can properly be said to have been denied due process of law.

1. The court of appeals was critical of the government's practice of calling as grand jury witnesses individuals known or suspected by the government to have some involvement in the kind of criminal activity under investigation (see Pet. App. 4a-5a). But this practice is vitally important to the grand jury process. Such individuals are appropriate and often necessary sources of information. *United States* v. *Mandujano*, *supra*, plurality op. 8-9, 19, n. 9. In the instant case, for example, respondent's testimony could have been critically important to the grand jury in determining who, if anyone, was involved in illegal gambling and police bribery. Moreover, a witness who is a "potential defendant" may wish to confess his or her part in the offense (the Constitution reflects no policy against voluntary confessions), or may be able to exculpate himself or herself to the satisfaction of the grand jury. See *United States* v. *Winter*, 348 F. 2d 204 (C.A. 2),

certiorari denied, 382 U.S. 955; *Mandujano*, *supra*, plurality op. 19, n. 9.

Thus, contrary to the court of appeals, we submit that there is nothing inherently unfair about normal grand jury questioning of individuals whom the grand jury or the prosecutor suspects of being involved in the criminal matter under investigation. As the court said in *United States* v. *Del Toro*, 513 F. 2d 656, 664 (C.A. 2), certiorari denied, 423 U.S. 826: "It is not an unfair dilemma to put upon a prospective defendant to require him to claim privilege or to tell the truth." So long as the witness's will has not been overcome by threats, trickery or force, the questioning of a "putative defendant," even without the giving of warnings, accords with due process, and the witness's choice to commit perjury should not be attributed, in the due process inquiry, to any action the government took or failed to take.

The government's conduct in this case was materially the same as that which the Court in *Mandujano* found not to violate applicable due process standards.[6] In both cases, the witness was called to

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[6] Thus, Mr. Justice Brennan observed in his concurring opinion that he was satisfied (on a record essentially the same as that in the instant case) that there were no "governmental tactics or procedures so inherently unfair under all the circumstances as to constitute a prosecution for perjury a violation of the Due Process Clause of the Fifth Amendment" (slip op. 1). And Mr. Justice Stewart, also relying on the *Bryson-Knox-Glickstein* line of cases for the proposition that the impropriety of questioning is ordinarily no defense to a perjury charge, stated, in words fully applicable to this case,

testify before a grand jury investigating criminal activity of a kind with which he or she was known to have some involvement. Mandujano was subpoenaed to testify before the grand jury because of his known connection with heroin distribution activities (plurality op. 19); respondent was called because of her known attempts at bribery of police officers and the belief that she would possess information about police corruption in Chinatown (Tr. 97). In both cases, the questions to which allegedly perjurious answers were given focused upon the witnesses' participation in unlawful activities about which the prosecutor already possessed specific information. Moreover, before questioning the witness in each case, the prosecutor issued detailed warnings of the right not to answer incriminating questions and the right to consult with counsel before answering any question. He also explained the concept of perjury and the significance of the oath to testify truthfully. Finally, as in *Mandujano*, none of the substantive questions asked of respondent concerned

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that he joined in reversal because "this is not a case where it could plausibly be argued that the perjury prosecution must be barred because of prosecutorial conduct amounting to a denial of due process" (concurring op.).

If anything, the government's position is somewhat stronger in the instant case because of the court of appeals' explicit recognition that there was no actual bad faith on the part of the government in its conduct of the grand jury proceedings (Pet. App. 5a, n. 4). The court of appeals in fact found that the government believed respondent understood her rights (*ibid.*).

matters outside the scope of the grand jury's legitimate investigative purposes. Compare *Brown* v. *United States*, 245 F. 2d 549, 555 (C.A. 8); *United States* v. *Cross*, 170 F. Supp. 303 (D. D.C.); *United States* v. *Icardi*, 140 F. Supp. 383 (D. D.C.); *La Rocca* v. *United States*, 337 F. 2d 39, 43 (C.A. 8); *Masinia* v. *United States*, 296 F. 2d 871, 877 (C.A. 8). See *United States* v. *Irali*, 503 F. 2d 1295, 1301-1302 (C.A. 7); *United States* v. *Lazaros*, 480 F. 2d 174, 176-178 (C.A. 6).

2. The court of appeals, however, thought it necessary to suppress respondent's testimony, not because of any prosecutorial misconduct, but because the district court had found that, unbeknownst to the government, respondent's lack of proficiency in the English language prevented her from fully understanding the prosecutor's explanation of her rights. As we have argued above (pp. 12-15, *supra*), although this finding is the only arguably relevant factual distinction we can perceive between this case and *Mandujano*, this difference does not support a different result on a self-incrimination analysis. Since the difference is unrelated to the conduct of the government, but depends solely upon subjective factors peculiar to the witness, it follows *a fortiori* that it cannot justify a different result from *Mandujano* on due process grounds.

At bottom, the court of appeals' decision probably rests upon the assumption that respondent's inability to understand the prosecutor's warnings left her confronted by an unfair "dilemma" between lying and incriminating herself (Pet. App. 3a). But in determining that this was an "unfairness" violative of due process rights, the court of appeals entirely overlooked the long line of decisions of this Court prior to *Miranda* evaluating the voluntariness and admissibility of statements obtained by interrogation of persons suspected of criminal offenses. See, *e.g.*, *Haynes* v. *Washington*, 373 U.S. 503; *Davis* v. *North Carolina*, 384 U.S. 737; *Turner* v. *Pennsylvania*, 338 U.S. 62. See also the government's brief in *Mandujano*, pp. 51-52. As the Court explained in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226-227, in none of these cases

> did the court rule that the Due Process Clause required the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated * * * they were not in and of themselves determinative.

See also *Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976;[7] *United States* v. *Watson*, 423 U.S. 411, 424-425.

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[7] In *Beckwith*, the Court refused to suppress statements made under non-compulsive circumstances, despite the fact that the person being interrogated was a "potential defendant" who was not fully warned of his rights. As *Beckwith* makes plain, the requirements of a knowing waiver imposed

Here, where respondent resolved her "dilemma" by lying to the grand jury, the Due Process Clause similarly does not require suppression of her testimony (which amounts to immunization from prosecution) solely on the ground she may not have known of her right to remain silent.[8] As we explained in our brief in *Mandujano* (pp. 16-19, 26-27, 35-36), suppression of perjurious testimony on the ground the government did not adequately inform a "putative defendant" witness of his or her rights would gain little or no protection for constitutional values, at the expense of possibly great impairment of the grand jury system. Respondent here knew the meaning and consequences of her having taken the oath. She was constitutionally entitled to no more.

by the Court in *Miranda* v. *Arizona*, 384 U.S. 436, in the context of custodial interrogation, has no place in the non-custodial situation.

[8] Nor can the court's result be justified on an entrapment rationale, for a "putative defendant" who lies to a grand jury rather than incriminate himself cannot be considered to be "entrapped" into committing perjury, as the concept of entrapment has been articulated by this Court, even if his false testimony is not the product of a knowing and intelligent waiver of the Fifth Amendment testimonial privilege. See *United States* v. *Lazaros*, *supra*, 480 F.2d at 178-179; *United States* v. *Dowdy*, 479 F.2d 213, 230 (C.A. 4), certiorari denied, 414 U.S. 866. The government does not implant the design to commit perjury in the mind of such a witness. See *United States* v. *Russell*, 411 U.S. 423, 436; *Hampton* v. *United States*, No. 74-5822, decided April 27, 1976. Nor does the government thwart whatever predisposition the witness may have to tell the truth. See *Sorrells* v. *United States*, 287 U.S. 435; *Sherman* v. *United States*, 356 U.S. 369. As the plurality said in *Mandujano* (slip op. 19) with respect to similar facts, "nothing remotely akin to 'entrapment' * * * is suggested by what occurred here."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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